



## DEPARTMENT OF THE TREASURY

### Financial Crimes Enforcement Network

### 31 CFR Chapter X

### RIN 1506-AB50

### Anti-Money Laundering Regulations for Dealers in Antiquities

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** FinCEN is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comment on the implementation of Section 6110 of the Anti-Money Laundering Act of 2020 (the AML Act). AML Act Section 6110 amends the Bank Secrecy Act (BSA) to include in the definition of “financial institution” a “person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities, subject to regulations prescribed by the Secretary [of the Treasury].” The AML Act requires the Secretary of the Treasury (the Secretary) to issue proposed rules to carry out that amendment not later than 360 days after enactment of the AML Act. This ANPRM seeks initial public comment on questions that will assist FinCEN in preparing the proposed rules.

**DATES:** Written comments are welcome, and must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Comments may be submitted, identified by Regulatory Identification Number (RIN) 1506-AB50 by any of the following methods:

*Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include RIN 1506–AB50 in the submission. Refer to Docket Number FINCEN–2021–0006.

*Mail:* Financial Crimes Enforcement Network, Policy Division, P.O. Box 39, Vienna, VA 22183. Include 1506–AB50 in the body of the text. Refer to Docket Number FINCEN–2021–0006.

Please submit comments by one method only.

## **FOR FURTHER INFORMATION CONTACT:**

*FinCEN:* The FinCEN Regulatory Support Section at 1-800-767-2825 or electronically at <https://www.fincen.gov/contact>.

## **SUPPLEMENTARY INFORMATION:**

### **I. Scope of the ANPRM**

This ANPRM seeks comment on various issues to assist FinCEN in preparing proposed rules to implement Section 6110(a)(1) of the AML Act.<sup>1</sup> AML Act Section 6110(a)(1) amends the BSA by adding to the BSA’s definition of “financial institution” “a person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities, subject to regulations prescribed by the Secretary.”<sup>2</sup> Section 6110(b)(1) requires the Secretary to issue proposed rules not later than 360 days after enactment of the AML Act to carry out that amendment.

### **II. Background**

#### *A. The BSA*

Enacted in 1970 and amended most recently by the AML Act, the BSA aids in the prevention of money laundering, terrorism financing, and other illicit financial activity. The purposes of the BSA include, among other things, “requir[ing] certain reports or records that are highly useful in—(A) criminal, tax, or regulatory investigations, risk assessments, or

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<sup>1</sup> The AML Act was enacted as Division F, Section 6001-6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat 3388 (2021).

<sup>2</sup> The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959 and 31 U.S.C. 5311-5314, 5316-5336. Implementing regulations are codified at 31 CFR Chapter X. Section 6110(a)(1) of the AML Act amends 31 U.S.C. 5312(a)(2).

proceedings; or (B) intelligence or counterintelligence activities, including analysis, to protect against terrorism.”<sup>3</sup>

Congress has authorized the Secretary to administer the BSA. The Secretary has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.<sup>4</sup> Pursuant to this authority, FinCEN is authorized to impose anti-money laundering (AML) and countering the financing of terrorism (CFT) program requirements for financial institutions. Specifically, to guard against money laundering and the financing of terrorism through financial institutions, the BSA requires financial institutions to establish AML/CFT programs that, at a minimum, include: (1) the development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.<sup>5</sup> The BSA further requires that, when prescribing minimum standards for AML/CFT programs, the Secretary shall prescribe regulations that “consider the extent to which the requirements imposed under [the AML program requirement] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.”<sup>6</sup> The Secretary shall additionally take into account certain factors, such as: (1) financial institutions are spending private compliance funds for a public and private benefit, including protecting the United States financial system from illicit finance risks; (2) the extension of financial services to the underbanked and the facilitation of financial transactions, including remittances, coming from the United States and abroad in ways that simultaneously prevent criminal persons from abusing formal or informal financial services networks are key policy goals of the United States; and (3) effective AML/CFT programs safeguard national security and generate significant public benefits by preventing the flow of illicit funds in the financial system and by assisting law

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<sup>3</sup> 31 U.S.C. 5311(1).

<sup>4</sup> Treasury Order 180–01 (Jan. 14, 2020).

<sup>5</sup> 31 U.S.C. 5318(h).

<sup>6</sup> USA Patriot Act, Pub. L. No. 107-56, 352(c), 115 Stat. 272, 322 (2001) (codified at 31 U.S.C. 5318 note).

enforcement and national security agencies with the identification and prosecution of persons attempting to launder money and undertake other illicit activity through the financial system.<sup>7</sup>

For certain categories of financial institutions, FinCEN has included explicit requirements to conduct customer due diligence and to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and conditions.<sup>8</sup>

In addition, the Secretary is required to prescribe regulations that require financial institutions to establish procedures for account opening that, at a minimum, include: (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) consulting lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency to determine whether the person seeking to open an account appears on any such list.<sup>9</sup>

In addition, under 31 U.S.C. 5318(g)(1), the Secretary is authorized to require financial institutions to report any suspicious transaction relevant to a possible violation of law or regulation. The Secretary is further authorized under 31 U.S.C. 5313 to require domestic financial institutions to report transactions of United States coins, currency, or other monetary instruments the Secretary prescribes, in an amount or circumstances the Secretary prescribes by regulation.

#### *B. Application of the BSA to Trade in Antiquities*

The BSA defines "financial institution" to include specific categories of institutions.<sup>10</sup> Section 6110(a)(1) of the AML Act amends 31 U.S.C. 5312(a)(2) to include as a type of financial institution "a person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of

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<sup>7</sup> 31 U.S.C. 5318(h)(2)(B).

<sup>8</sup> 31 CFR 1010.230.

<sup>9</sup> 31 U.S.C. 5318(l).

<sup>10</sup> 31 U.S.C. 5312(a)(2), (c)(1).

antiquities, subject to regulations prescribed by the Secretary.” Section 6110(b)(1) directs the Secretary to issue proposed rules implementing this amendment not later than 360 days after enactment of the AML Act, *i.e.*, by December 27, 2021. This amendment to the BSA’s definition of “financial institution” takes effect on the effective date of the final rules issued by the Secretary pursuant to Section 6110(b)(1).<sup>11</sup>

Before issuing a proposed rule, the Secretary (acting through the Director of FinCEN), in coordination with the Federal Bureau of Investigation (FBI), the Attorney General, and Homeland Security Investigations (HSI), is required to consider:

- (A) the appropriate scope for the rulemaking, including determining which persons should be subject to the rulemaking, by size, type of business, domestic or international geographical locations, or otherwise;
- (B) the degree to which the regulations should focus on high-value trade in antiquities, and on the need to identify the actual purchasers of such antiquities, in addition to the agents or intermediaries acting for or on behalf of such purchasers;
- (C) the need, if any, to identify persons who are dealers, advisors, consultants, or any other persons who engage as a business in the trade in antiquities;
- (D) whether thresholds should apply in determining which persons to regulate;
- (E) whether certain exemptions should apply to the regulations; and
- (F) any other matter the Secretary determines is appropriate.<sup>12</sup>

FinCEN has engaged with the FBI, the Department of Justice, HSI, and other agencies in considering these matters during the development of this ANPRM, and welcomes any additional comments from the law enforcement community on these specific matters or any other aspect of the ANRPM.

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<sup>11</sup> AML Act Section 6110(a)(2).

<sup>12</sup> AML Act Section 6110(b)(2).

*C. The Potential for Money Laundering, Terrorist Financing, and Other Illicit Financial Activity through Trade in Antiquities*

Certain characteristics of the trade in antiquities may be exploited by money launderers and terrorist financiers to evade detection by law enforcement. These characteristics include client confidentiality; varying practices across the industry in, and challenges associated with, accurately documenting provenance; the use of intermediaries; and unregulated customer due diligence practices. In addition, the potentially small size, ease of transport, and subjectivity of prices of antiquities, among other things, provide an opportunity to use these items to transport value across borders without reporting to authorities or detection by customs agents or law enforcement agencies. Illicit actors may exploit these or other features of the antiquities trade to launder funds through the U.S. financial system.

Terrorist organizations, transnational criminal networks, and other malign actors may also seek to exploit antiquities to transfer value to acquire new sources of funds, evade detection, and launder proceeds from their illicit activities. Some terrorist groups have generated revenue from permitting or facilitating the illegal extraction or trafficking of antiquities in territories where they operate.<sup>13</sup>

On March 9, 2021, FinCEN issued a Notice informing financial institutions about Section 6110(a) of the AML Act and explaining that financial institutions with existing BSA obligations, including the reporting of suspicious activity, should be aware that illicit activity associated with the trade in antiquities and art may involve their institutions.<sup>14</sup> In the Notice, FinCEN explained that crimes relating to antiquities and art may include looting or theft, the illicit excavation of archaeological items, smuggling, and the sale of stolen or counterfeit objects. They may also include money laundering and sanctions violations, and have been linked to transnational

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<sup>13</sup> See, e.g., U.S. House of Representatives, Committee on Financial Services, Task Force to Investigate Terrorist Financing, *Stopping Terror Finance: Securing the U.S. Financial Sector*, December 20, 2016, at 10-12.

<sup>14</sup> See FIN-2021-NTC2, *FinCEN Informs Financial Institutions of Efforts Related to Trade in Antiquities and Art*, March 9, 2021.

criminal networks, international terrorism, and the persecution of individuals or groups on cultural grounds.

### **III. Issues for Comment**

FinCEN seeks comment from members of the antiquities industry, law enforcement, civil society groups, and the broader public regarding the potential for money laundering, financing of terrorism, and other illicit financial activity in the antiquities industry; the existence of any safeguards in the industry to guard against this potential; the effect that compliance with BSA requirements could have on the antiquities industry; what additional steps may be necessary to protect the industry from abuse by money launderers and other malign actors; and which actors within the antiquities trade should be subject to BSA requirements.

FinCEN invites comments on all aspects of this ANPRM, and specifically seeks comments on the questions listed below. Commenters should reference specific question numbers to facilitate FinCEN's review of comments.

#### *A. The Antiquities Market*

1. Please identify and describe the roles, responsibilities, and activities of persons engaged in the trade in antiquities, including, but not limited to, advisors, consultants, dealers, agents, intermediaries, or any other person who engages as a business in the solicitation or the sale of antiquities. Are there commonly understood definitions of particular roles within the industry? Who would be considered within or outside such definitions?
2. How are transactions related to the trade in antiquities typically financed and facilitated? What are the typical sources and types of funds used to facilitate the purchase of items in the antiquities market? How common are leveraged or financed purchases in the antiquities market? How common are cash transactions in the trade in antiquities?
3. Can the antiquities market be broken down to show the percentage of transactions that fall in a given monetary range (*e.g.*, 50% of all transactions fall below \$X-value)? If so, please provide a breakdown of those ranges.

4. What, if any, information does a buyer typically learn about the seller, cosigner, or intermediary involved in the sale of antiquities? When a seller, cosigner, or intermediary offers an item for sale, why might a person involved in the antiquities trade withhold the name of the seller, cosigner, or intermediary from the buyer? What, if any, business purpose does this serve? Should the buyer have the right to learn this information to determine whether the provenance of an item is legitimate? Why or why not?
5. How do foreign-based participants in the antiquities market operate in the United States? Do they operate directly as advisors, consultants, dealers, agents, intermediaries, or others? Or do they work with domestic advisors, consultants, dealers, agents, intermediaries, or others?
6. When advisors, consultants, dealers, agents, intermediaries, or others receive payment from overseas accounts, what steps do they take, if any, to determine whether the payment comes from a legitimate source?
7. What are the money laundering, terrorist financing, sanctions, or other illicit financial activities risks associated with the trade in antiquities? What is the industry experience with money laundering, terrorist financing, and other illicit financial activity? Which parts of the market are most vulnerable to these risks? In which geographical locations do those vulnerabilities tend to take place? Are there certain types of persons engaged in the trade in antiquities whose activities present lower money laundering, terrorist financing, and other illicit financing risks and for whom the application of BSA requirements is less critical? Are there certain types of persons engaged in the trade in antiquities whose activities present greater money laundering, terrorist financing, and other illicit financing risks and for whom the application of BSA requirements is more critical?
8. Which participants involved in the trade in antiquities are in positions in which they can effectively identify and guard against money laundering, the financing of terrorism, and



other illicit financing risks in connection with the transactions they conduct? For example, do these participants have access to information regarding the nature and purpose of the transactions at issue and the participants' involvement in completion of the transactions?

9. What, if any, safeguards does the industry currently have in place to protect against business loss and fraud? For example, how, if at all, do market participants currently identify and verify the identity of the buyer, seller, or ultimate beneficial owner of an antiquity to guard against money laundering, terrorist financing, or other illicit financial activity? To what extent do market participants conduct due diligence on agents and other intermediaries involved in purchases and sales of antiquities? To what extent do safeguards vary depending on the size, nature of the transactions, and whether the transaction involves foreign jurisdictions? To what extent are the safeguards voluntary or required by contractual arrangements, trade associations, or other forms of industry self-regulation? Could these safeguards be leveraged and modified to detect and prevent money laundering, terrorist financing, and other illicit financial activities, or to better detect and prevent such activities?

#### *B. Regulation of the Industry*

10. How should "antiquities" be defined for the purposes of FinCEN's regulations? Should jurisdictional or territorial considerations be taken into account when determining how antiquities should be defined (*e.g.*, foreign cultural heritage laws)?
11. How is an antiquity distinct from a work of art?
12. How should "trade of antiquities" be defined for the purposes of FinCEN's regulations? Should FinCEN distinguish between the commercial, for-profit trade of antiquities and non-commercial, not-for-profit activity? If so, how?

13. Are there any other terms that FinCEN should consider addressing and defining as part of a rulemaking on the trade in antiquities? If so, what are those terms, why should they be addressed, and how should they be defined?
14. Should FinCEN establish a monetary threshold for activities involving trade in antiquities that would subject persons involved in such activities above that threshold to FinCEN's regulations, but exempt persons whose activities fall below that threshold? What is an appropriate dollar value for such a threshold and should it be set as an annual or per-transaction threshold? Should there be a different threshold — including potentially a zero-dollar threshold — for legal entities as opposed to natural persons?
15. Should there be any other exemptions for categories or types of persons engaged in the trade of antiquities beyond the consideration of a monetary threshold?
16. Which aspects of the current regulatory framework applicable to financial institutions should apply to persons engaged in the trade in antiquities?
- a. Should FinCEN consider extending all or only some elements of AML/CFT program requirements now applicable to financial institutions to the trade in antiquities, including: (i) a system of internal controls to ensure ongoing compliance, (ii) independent testing for compliance to be conducted by internal financial institution personnel or by an outside party, (iii) designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance, or (iv) training for appropriate personnel?
  - b. How could know-your-customer requirements, such as customer due diligence or customer identification programs, apply in the transaction process in the trade in antiquities? What would be the effect on industry of imposing customer verification and identification requirements on sellers, purchasers, and others involved in the trade in antiquities? How would the application of know-your-

customer requirements to this industry assist in preventing money laundering, terrorist financing, and other illicit financial activity?

- c. What, if any, difficulties are associated with requiring the disclosure of or otherwise obtaining beneficial ownership information for legal entities engaged in the trade of antiquities, including foreign legal entities that may be outside the scope of current or future U.S. beneficial ownership reporting requirements?
- d. What should be the requirements for filing SARs related to antiquities? What should FinCEN consider in implementing any requirements for filing SARs related to antiquities?
- e. How many natural persons and legal entities might be affected by FinCEN's application of BSA requirements to persons engaged in the trade in antiquities, and what is the estimated hourly and annual burden, if any, for each such person, for each of the obligations described above? How could FinCEN minimize the burdens associated with these obligations, if any, through its decisions about the form or content of the rule while still ensuring the appropriate management and mitigation of AML/CFT risk?

## **B. Regulatory Planning and Review**

This ANPRM is a significant regulatory action under Executive Order 12866 and has been reviewed by the Office of Management and Budget.

## **C. Conclusion**

With this ANPRM, FinCEN seeks input on the questions set forth above. FinCEN welcomes comments on all aspects of the ANPRM, and all interested parties are encouraged to provide their views.

Dated: September 20, 2021

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